IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.166 of 1993

1. S.Gnanasigamani
2. S.Jesudasan
3. F.Samidas
4. F.Rajaroche .. Appellants

-Vs-

1. G.Bangiras
2. S.Jesurathinam .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree of the Court of Subordinate Judge, Nagercoil in A.S.No.8/91 and dated 29.4.1992 reversing the judgment and decree of the Court of Additional District Munsif, Nagercoil, in O.S.No.816/82 and dated 8.1.1990.

!For Appellants : Mr.V.Raghavachari

^For Respondents : Mr.V.Selvaraj
for M/s.R.N.Amarnath

:JUDGMENT

This second appeal has been brought forth from the judgment of the learned Subordinate Judge, Nagercoil, made in A.S.No.8/91 wherein the judgment of the trial Court namely the Court of Additional District Munsif, Nagercoil, was reversed by dismissing the suit.

2. The plaintiffs, who are the appellants herein, filed the suit seeking for a declaratory relief that the walls shown as ABCD and EFGH in the plaint Schedule are the common boundary walls of the plaintiffs and the second defendant on the one hand and the first defendant on the other and for consequential injunction restraining the first defendant from putting up any wall or constructions above the said ABCD and EFGH walls or to raise the walls with the following allegations:

The suit property namely a wall, along ABCD and EFGH is the common boundary wall of the western 14 < cents belonging to the father of the first defendant Gnanakkan Nadar and of the eastern 14 > cents from the west belonging to the father of the plaintiffs 1 and 2, the second defendant and the grandfather of the plaintiffs 3 and 4 Swamiyadian Nadar. In the family

arrangement among the sons of Gnanakkan Nadar, the western half of the western 14 > cents was obtained by Thankiah, while the eastern half of the western 14 > was obtained by the first defendant. The first defendant put up a building in his property; but, the eastern wall of the house was put up abutting the common boundary of the western most 14 > cents and the eastern 14 > cents. The parties measured the properties and found out that the eastern wall of the house came on the common boundary line. As the parties are related, the sons of Swamiyadian Nadar never wanted to demolish the house wall of the first defendant. In the common intervening boundary, long before the construction made by the first defendant, Swamiyadian Nadar put up a wall on the northern side of the house wall and constructed a cattle shed. There was a partition in the year 1965 among the heirs of Swamiyadian Nadar, and the said eastern 14 > cents was divided into various plots. The said cattle shed was also removed by the parties at the time of partition. In the year 1980, the parties put up a common boundary wall along ABCD and DEFG portions. The suit walls along ABCD and EFGH was put up by the parties as common boundary walls. Neither the plaintiffs nor the first defendant is entitled to use the common boundary walls for their own use. While so, the first defendant attempted to raise the level of the walls, and thus, there arose a necessity for filing the suit for the above said reliefs.

3. The second defendant remained ex-parte. The suit was resisted by the first defendant with the following allegations:

It is false to state that the wall at ABCD and EFGH is a common boundary wall. The first defendant's father Gnanakkan Nadar was allotted the western most plot measuring 15 cents, in the partition. The first defendant put up a house about 25 years ago in his eastern side, and the eastern wall of his house was built on his eastern most boundary. He also put up a mud wall upto south and north in line with the eastern wall of his house, and subsequently, a rubble wall was situated at BD about 2 years ago and at FH a year ago. This wall is well situated in his property alone, and it is not a common boundary wall. The cattle shed of Swamiyadian Nadar was in his own property and has nothing to do with the first defendant's property. The first defendant as full owner has ever right to use the wall or raise its level, etc. The plaintiffs have no right to question the same. When the first plaintiff and his friends attempted to demolish the wall on 19.8.1982 and demolished some portions of it, the first defendant gave a police complaint. The police admonished the plaintiffs. After that only, the plaintiffs have come forward with the false suit, and hence, the same was to be dismissed.

4. The trial Court framed the necessary issues, tried the suit and granted a decree as asked for. Aggrieved, the first defendant took it on appeal, wherein the judgment of the trial Court was reversed and the suit was dismissed by the first appellate Court. Thus, the second appeal has arisen before this Court at the instance of the plaintiffs.

5. At the time of admission, the following substantial questions of law were formulated by this Court:

(1) Whether the lower appellate Court misconstrued the evidence and the materials on record in reversing the judgment of the trial Court?

(2) Whether the first respondent has discharged his burden of proving the allotment of an excess share to justify the lower appellate Court's interference of the judgment of the trial Court?

6. This Court has heard the learned Counsel for the appellants and also the learned Counsel for the respondents on those contentions.

7. It is an admitted position that the properties originally belonged to three brothers, and the western part was given to Gnanakkan Nadar, the father of the first defendant, while the middle portion was given to Swamiyadian Nadar, the father of the plaintiffs 1 and 2, the second defendant and the grandfather of the plaintiffs 3 and 4. The case of the plaintiffs was that there has all along been a common wall in between the properties allotted to Gnanakkan Nadar and Swamiyadian Nadar; that on the northern part of his property, Swamiyadian Nadar raised a cowshed east west; that the common wall was situated on the north of the said cowshed; that just 22 years prior to the proceedings, the first defendant raised his tiled construction in his property, and thus, there arose an occasion to measure the respective properties of the parties; that it was found that the eastern wall of his property was within the common boundary; that taking into consideration the close relationship of the first defendant, the plaintiffs did not ask him to remover the said wall; that on both sides of the said construction, the two parts of the earlier common wall i.e. ABCD on the one part and EFGH on the other part, continue to remain as the common wall; and that while so, the defendants were making attempts to raise constructions on the common wall in question, which necessitated them to file the suit for the said reliefs. What was all contended by the first defendant before the Courts below and equally here also is that at the time of partition among the three brothers, the first son Gnanakkan Nadar was allotted 15 cents; that the parties took up their respective shares; that the wall in question was actually constructed by the first defendant exclusively; that he has been in enjoyment also, and hence, such a declaratory relief cannot be granted. Added further the learned Counsel for the respondents that even assuming that the walls ABCD and EFGH are within the boundaries of the plaintiffs, they should have asked for the recovery of possession of the portion which was in the possession of the first defendant and not for a declaration like this in respect of the wall, which was raised by the first defendant.

8. After careful analysis of the evidence, this Court is of the considered view that the judgment of the first appellate Court has got to be set aside, and the judgment of the trial Court has got to be restored.

9. The plaintiffs have sought for the reliefs alleging that the two walls shown as ABCD and EFGH are the common walls belonging to the plaintiffs and the first defendant. It is not in dispute that there was originally a partition between the three brothers. The specific case of the plaintiffs was that all were given equal shares namely 14 s cents. While admitting the partition between the brothers, the first defendant would contend that his father Gnanakkan Nadar being the eldest son, was given 15 cents. Excepting mere assertion by the first defendant, no material was available to hold that his father was allotted 15 cents. In the absence of any proof that the father of the first defendant was allotted 15 cents, the said contention put forth by the first defendant cannot be countenanced.

10. It is not in dispute that in between these two walls namely ABCD and EFGH, the tiled construction raised by the first defendant is in existence. The eastern wall of the said construction and the said two walls are in the same alignment. But, the plaintiffs have averred in the plaint that even though the eastern wall of the tiled construction of the first

defendant was constructed well within the common boundary, considering the relationship, it was neither objected to, nor any relief was sought for subsequently in that regard. Thus, now the relief sought for is only in respect of ABCD wall on the one part of the said construction and EFGH wall on the other part of the said construction. An Advocate Commissioner, appointed by the Court, on inspection, measured the properties, and gave a report stating that both these walls ABCD and EFGH are within the boundaries of the plaintiffs. This would be indicative of the fact that both these walls are well within the boundaries of the plaintiffs.

11. At this juncture, it has to be pointed out that the plaintiffs have not sought for the reliefs on the ground that both these walls exclusively belonged to them. But, they have asked for a declaratory relief that the walls belonged to both the parties commonly. The first appellate Court has denied the relief stating that in the partition deed entered into between the parties as evidenced by Ex.A1, this common wall has not been shown. Had it been true that the common wall is situated on the west of their property, the same should have been shown therein, but, not done so. Hence, the case of the plaintiffs cannot be accepted. This Court is unable to appreciate or agree with the view taken by the first appellate Court for the simple reason that Ex.A1 was a partition deed entered into among the members of the plaintiffs' family inter se, and this wall in question is a common wall, which belonged to the plaintiffs' family and the first defendant's family. In view of the fact that it is not made mention of in the partition deed entered into between the plaintiffs' inter se, it cannot be stated that the wall what has been there in the past and within the property of the plaintiffs, cannot now be stated as one did not belong to them. That apart, it is pertinent to point out that the case of the first defendant all along was that the walls were raised by him exclusively, in which there was not even any participation by the plaintiffs, and that too they lie within his property. So long as the first defendant is unable to show that his father Gnanakkan Nadar was allotted 15 cents and in the absence of any proof that the wall was raised by him within his boundaries and apart from that, when the walls were found within the boundaries of the plaintiffs, this Court cannot find any impediment in granting a relief that both the walls ABCD situated on one part of the first defendant's construction and EFGH situated on the other part of the first defendant's construction are common to both the parties, and hence, the trial Court has rendered the judgment only on appreciation of evidence and rightly too. But, the erroneous view taken by the first appellate Court has got to be set aside.

12. In the result, this second appeal is allowed, setting aside the judgment and decree of the first appellate Court and leaving the parties to bear their costs.

Index: yes
Internet: yes

To:
1. The Subordinate Judge
Nagercoil
2. The Additional District Munsif
Nagercoil

3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/